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No. 06-1176

In The
Supreme Court of the United States

HIGH COUNTRY CITIZENS' ALLIANCE; TOWN OF CRESTED BUTTE, COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO,

Petitioners,

v.

DIRECTOR, BUREAU OF LAND MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* ADMINISTRATIVE LAW AND PUBLIC LANDS LAW PROFESSORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 37.3(b) of the Rules of this Court, *amici curiae* respectfully submit this Motion for Leave to File the accompanying brief in support of Appellants' Petition for Writ of Certiorari. *Amici* urge this Court to grant certiorari and to vacate the decision of the Court of Appeals in this case.

Counsel for Petitioners and Counsel for the United States Department of the Interior (BLM) consents to the filing of this brief. Counsel for the mining company has not granted consent.

The law professors who submit this brief collectively specialize in administrative law and public land law. Several of them have written authoritative treatises and casebooks on these subjects and particularly on the General Mining Law of 1872 (hereinafter the "Mining Law"), a statute central to this dispute.

Amici have an interest in ensuring that the rules governing judicial review of federal agency action pursuant to the APA are interpreted properly and that the public's right to participate in the efficient and fair resolution of controversies arising on the nation's public lands is protected. This is especially true given the profound importance of the BLM's decisions in the case – the privatization of public lands through the denial of the Petitioners' administrative protests and the subsequent issuance of the patent. The far-reaching consequences of the decision in this case for the management and disposal of hundreds of millions of acres of federal public lands in the West, and the conflict between the majority's decision and

established precedent under both the APA and the Mining Law, lead *amici* to urge this Court to grant certiorari and vacate the judgment of the Court of Appeals in this matter.

Respectfully submitted,

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TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI 1

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Allowing Judicial Review of the BLM's Denial of a Protest to a Patent Application Would Not Frustrate the Statutory Scheme 3

A. The Mining Law expressly provides for participation by members of the public in the mineral patent process 6

B. The petitioners' interests are not adequately represented by the other parties 7

C. Allowing judicial review of the BLM's decision to deny a protest to a mineral patent does not circumvent the statutory scheme... 9

II. Section 555 of the Administrative Procedure Act Establishes a Complementary Administrative Process Whereby Judicial Review is Available to the Petitioners 10

III. The Court of Appeals Misconstrued the Statutory Purpose of the 1872 Mining Law 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Block v. Cmty. Nutrition Institute, 467 U.S. 340 (1984) ..... *passim*

Chambers v. Harrington, 111 U.S. 350 (1884) 12

Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir. 2000) 5

Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) 5

High Country Citizens' Alliance v. Clarke, 454 F.3d 1177 (2006) 5, 11

In re: Pacific Coast Molybdenum Co., 68 IBLA 325, GFS (MIN) 329 (1982) 8

Richards v. Dower, 22 P. 304 (Cal. 1889) 6

Stark v. Wickard, 321 U.S. 288 (1944) 4

United States v. Union Pacific R. Co., 353 U.S. 112 (1957) 12

Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983) 12

Wilderness Soc. v. Robertson, 824 F. Supp. 947 (D. Mont. 1993), *aff'd, Wilderness Society v. Dombeck*, 168 F.3d 367 (9th Cir. 1999) 8

STATUTES AND RULES

5 U.S.C. § 555 ..... 2, 10, 11

5 U.S.C. § 702 ..... 7, 8, 10

5 U.S.C. § 706 ..... 9, 11

30 U.S.C. § 22 6

30 U.S.C. § 29 ..... 6, 7, 9

TABLE OF AUTHORITIES – Continued

Page

30 U.S.C. § 30 9

43 C.F.R. § 4.450-2 8

43 C.F.R. § 3872.1(a) 7, 8, 9

OTHER AUTHORITIES

AMERICAN LAW OF MINING, 2ND EDITION § 53.01 (1984 edition) 7

JOHN LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1987) 12

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who collectively specialize in administrative law and public land law. Several have written authoritative treatises and casebooks concerning these subjects and specifically on the General Mining Law of 1872, a statute central to this dispute. *Amici* respectfully urge this Court to grant the petitioners' requested writ of certiorari and to vacate the judgment of the United States Court of Appeals for the Tenth Circuit.

Amici have a strong interest in ensuring that lower courts properly interpret the scope of judicial review of federal agency actions pursuant to the mandates of the Administrative Procedure Act (APA) and Supreme Court precedent. Unlike other Circuits that have interpreted *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984), the Tenth Circuit read this Court's holding far too broadly. It failed to distinguish the essential facts in *Block* from the case at bar and mistakenly construed Congressional intent in adopting the Mining Law to preclude judicial review of protests to mineral patents.

The law professors also have an interest in the fair and efficient resolution of controversies concerning the nation's public lands. The decision in this case has far reaching consequences for the management and disposal of hundreds of millions of acres of federal public lands in the West.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Tenth Circuit incorrectly applied this Court's decision in *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984) to the facts of this case. The Court of Appeals interpreted this Court's holding in *Block* too broadly. In so doing, the Tenth Circuit undermined the longstanding presumption of reviewability of agency actions and erroneously found that in adopting the Mining Law Congress intended to preclude review of citizen challenges to mining patents. *Block* can and should be construed narrowly so as to preserve the strong presumption of reviewability mandated by this Court and the APA.

Section 555 of the APA offers an alternative rationale for recognizing the petitioners' right to judicial review in this case. Section 555 provides interested parties a right to appear before an administrative agency in an agency proceeding, and imposes a duty on an agency to conclude a matter presented to it within a reasonable time. It further requires an agency to provide prompt notice of denial of a request by an interested party, and a brief statement of the grounds for any such denial. Review of such decisions is then available under the APA. The petitioners in this case appeared before the agency, requested relief, and their request was denied. A direct application of the APA requires that the petitioners be afforded the right to judicial review.

Because the Tenth Circuit's holding in this case improperly limits judicial review of patent protests under the Mining Law and undermines the presumption of reviewability of agency actions, *amici* urge this Court to

grant the petitioners' writ of certiorari and to vacate the judgment of the Court of Appeals.

ARGUMENT

I. Allowing Judicial Review of the BLM's Denial of a Protest to a Patent Application Would Not Frustrate the Statutory Scheme.

The Court of Appeals misapplied *Block* and wrongly concluded that in enacting the Mining Law Congress intended to preclude judicial review of citizen protests to allegedly invalid mineral patents. In *Block*, this Court held that the Agricultural Marketing Agreement Act precluded judicial review by consumers of milk market orders. 467 U.S. at 352.

Block found that the "fundamental objectives of the statute" and the statutory scheme as a whole demonstrated that Congress intended to preclude challenges by milk consumers to milk market orders. *See* 467 U.S. at 352-53. The purpose of the Agricultural Marketing Agreement Act – to "raise the price of agricultural products and to establish an orderly system for marketing them" – was furthered by allowing handlers and producers to participate in the process of adopting and retaining market orders. *Id.* at 346. Handlers could pursue administrative remedies and seek judicial review once those remedies were exhausted. *Id.* at 346. Furthermore, this Court determined that handlers could be relied on to challenge unlawful agency action and to ensure that the statute's objectives would not be frustrated. *Id.* at 352. No additional purpose would be served by allowing consumers to seek judicial review, since consumers had a similar

interest to handlers in obtaining milk as cheaply as possible. *Id.* at 352.

Of particular concern to this Court in *Block* was a statutory loophole that allowed milk handlers to evade the statutory administrative scheme. *See id.* at 348. Denying consumers the right to judicial review closed this loophole. *See id.* If consumers had the right to judicial review, handlers could sue directly as consumers, or they could enlist a willing consumer to bring a suit, either of which would allow the handler to bypass the statute's requirement of first exhausting all administrative remedies. *Id.* Consumers might be able to seek judicial review of milk market orders without first pursuing an administrative remedy, while producers, whom the statute primarily aimed to protect, could not.

While the *Block* Court found evidence of intent to preclude review of consumer challenges under the Agricultural Marketing Agreement Act, the Court itself recognized the Court's general predisposition favoring the right of judicial review. Even though it denied consumers the right to seek judicial review of milk market orders, the Court noted that in an earlier decision it upheld the right of dairy producers to challenge administrative decisions related to the producer settlement fund, despite the fact that the Act did not give them an express right of review. *Block*, 467 U.S. at 351, *citing Stark v. Wickard*, 321 U.S. 288 (1944). As the Court explained, precluding judicial review of producers' complaints would offer "'no forum' in which this aspect of the Secretary's actions could or would be challenged." *Id.* at 352. Judicial review of producer complaints was thus important to the statutory purpose and had to be preserved. *Id.*

Given the strong presumption favoring judicial review, it is not surprising that lower courts have construed *Block's* mandate narrowly. For example, the U.S. Court of Appeals for the Seventh Circuit held that *Block* does not preclude antitrust claims filed by consumers under the Sherman Antitrust Act. *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399 (7th Cir. 2000). And in another case involving the BLM, the U.S. Court of Appeals for the Ninth Circuit found that *Block* did not bar challenges brought by third parties to the "equal value" provisions for land exchanges under the Federal Land Policy and Management Act, notwithstanding provisions for arbitration of such disputes among parties to the exchange. *Desert Citizens Against Pollution v. Bisson,* 231 F.3d 1172 (9th Cir. 2000).

The Mining Law differs from the Agricultural Marketing Agreement Act in at least three key ways that are relevant to the petitioners' right to seek judicial review in this case. First, as the petitioners' brief notes, the statutory scheme of the 1872 Mining Law explicitly provides for participation in the patent process by members of the public. *See* Petitioners' Brief at 16; *High Country Citizens' Alliance v. Clarke*, 454 F.3d 1177 (2006). This distinction is critically important to the resolution of this case. Second, the petitioners' interest in preventing the unlawful transfer of pubic lands to private ownership is not adequately represented by the parties to an adverse claim proceeding. Finally, unlike *Block*, granting third parties the right to judicial review will not circumvent the statutory scheme. Each of these differences is explored in detail below.

A. The Mining Law expressly provides for participation by members of the public in the mineral patent process.

Under the Mining Law, only those lands containing valuable mineral deposits are reserved for occupation and purchase. 30 U.S.C. § 22. *See Richards v. Dower*, 22 P. 304, 306 (Cal. 1889), *aff'd*, 151 U.S. 658 (1894) (stating that the policy underlying the Mining Law was "to reserve only such mineral lands as are valuable as such"). Accordingly, the statute requires the Secretary to ensure that the provisions of the Mining Law are met before the BLM may remove land from the public domain and transfer it into private hands through the patent process.

The statutory scheme expressly provides for participation by members of the public to prevent the BLM from improperly transferring public lands to patentees. The Mining Law allows "third parties" (parties who are not adverse claimants) to challenge patent applications that fail to meet the statutory requirements:

> If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter *no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of [the Mining Law].*

30 U.S.C. § 29. (Emphasis added). The BLM has interpreted this provision as allowing members of the public to file a protest "[a]t any time prior to the issuance of a patent . . . upon any ground tending to show that the

applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings." 43 C.F.R. § 3872.1(a). *See also* AMERICAN LAW OF MINING, 2ND EDITION § 53.01 (1984 edition). Having been granted a right to protest the BLM's decision, the petitioners have a right to challenge an adverse decision from the agency under the express language of the APA. 5 U.S.C. § 702 (recognizing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof").

B. The petitioners' interests are not adequately represented by the other parties.

Unlike the milk consumers in *Block*, the petitioners' interests are not and could not be adequately represented by other parties to the proceeding. Adverse claimants have an interest in protecting their own claims against strict enforcement of the Mining Law. They do not have an independent interest in ensuring compliance with the law or in protecting the public interest. By contrast, members of the public and local government agencies have an interest in protecting their use and enjoyment of public lands and in preventing its wrongful transfer to private ownership under the mineral patent process. Where the government fails to protect the public interest by identifying violations of law on its own, Congress plainly intended that third parties should have the right to raise these issues in the context of patent proceedings. 30 U.S.C. § 29.

Beyond the clear right granted by the statute, the Interior Department itself has long recognized the right of interested members of the public to protest mineral patent

applications. 43 C.F.R. §§ 4.450-2; 3872.1(a) (2005). Moreover, the Interior Board of Land Appeals (Board) has affirmed the right of protestants to seek an administrative appeal from an adverse BLM decision on a patent application. In *In re: Pacific Coast Molybdenum Co.*, 68 IBLA 325, GFS (MIN) 329 (1982), the Board considered a protest by various public interest groups to a mineral patent application. The Board rejected the claimant's argument that the case was "limited to rights in land determinable in statutory adverse proceedings." *Id.* at 333. It further found that parties who use resources that may be impaired by proposed mining operations had standing to challenge the BLM's decision before the Board. *Id.* at 332. It follows directly from the APA that such parties also have the right to challenge an adverse decision by the Board in an appropriate federal court. 5 U.S.C. § 702.

At least one federal district court has recognized that environmental plaintiffs have standing to challenge a Forest Service determination regarding the validity of mining claims located in the Cabinet Mountains Wilderness Area. *Wilderness Soc. v. Robertson*, 824 F. Supp. 947, 951 (D. Mont. 1993), *aff'd, Wilderness Society v. Dombeck*, 168 F.3d 367 (9th Cir. 1999). The plaintiffs did not directly seek judicial review of their protest to the mining corporation's patent application, because the protest was pending at the time of the lawsuit. *See id.* at 953-54. However, the district court held that the pending patent proceeding did not bar the court from ruling on the validity determination. To the contrary, it held that the BLM's analysis would "aid the court in ruling on [the validity determination] claims." *Id.* at 954.

C. Allowing judicial review of the BLM's decision to deny a protest to a mineral patent does not circumvent the statutory scheme.

The Mining Law also differs from the Agricultural Marketing Agreement Act at issue in *Block* in that access to judicial review of protests to patent applications does not allow parties to bypass the available administrative remedies and instead seek judicial review. Rather, a member of the public who files a protest against a patent application participates in an administrative process from which judicial review under the limited scope of the APA would be available. 5 U.S.C. § 706(2)(A)-(D). Unlike the consumers in *Block*, there would be no danger that the protesting parties would circumvent the administrative review process.

Furthermore, allowing judicial review of patent protests would not afford competing claimants an avenue to bypass the statutory scheme. Under the Mining Law, adverse claimants may directly "commence proceedings in a court of competent jurisdiction." 30 U.S.C. § 30. Consequently, there is no incentive for an adverse claimant to bypass Section 29, the section that directly concerns adverse claims, by filing a protest to a patent.

Moreover, an adverse claimant who sought to thwart the Section 30 process by filing a protest would run afoul of 43 C.F.R. § 3872.1(a), which specifically provides that a protest "cannot . . . be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit." By precluding unsuccessful adverse claimants from using the protest process, this regulation renders inapplicable one of the key concerns identified by the Court in *Block*.

II. Section 555 of the Administrative Procedure Act Establishes a Complementary Administrative Process Whereby Judicial Review is Available to the Petitioners.

Section 555 provides that "an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function." 5 U.S.C. § 555(b). The APA imposes a duty on an agency to conclude a matter presented to it "within a reasonable time." *Id.* "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. . . . [T]he notice shall be accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e). Review of such decisions is then available under 5 U.S.C. § 702 of the APA. 5 U.S.C. § 555.

In the instant case, the petitioners availed themselves of the protest procedures available to them under the Mining Law and implementing regulations. As aggrieved parties in this process, the petitioners have a right to judicial review in accordance with 5 U.S.C. § 702. Beyond this process, however, the petitioners' protest could have been addressed under the complementary procedures available to any interested party under Section 555 of the APA. They had a right to appear before the BLM and request that the patent application be denied. If the BLM rejected their request, they had a right to notice of that denial and a brief statement of the grounds. And as aggrieved parties under 5 U.S.C. § 702, they had a right to

judicial review of that decision, subject to the deferential standard of review under 5 U.S.C. § 706(2).

Block involved a unique statutory scheme that limited administrative challenges to producers and handlers of milk. Whether or not the consumers in *Block* could have invoked an administrative remedy under 5 U.S.C. § 555, they failed to do so, and as a result the Court denied their right to sue. By contrast, the petitioners in this case have pursued the administrative remedy available to them under the Mining Law. But even if those procedures were unclear, the petitioners had a right to pursue their protest to these patent applications under 5 U.S.C. § 555. Where, as here, the petitioners have lawfully availed themselves of an administrative process and are seeking judicial review from that decision, *Block* is simply inapposite.

III. The Court of Appeals Misconstrued the Statutory Purpose of the 1872 Mining Law.

In denying petitioners' right to judicial review, the Court of Appeals relied in substantial part on its conclusion that "security of title" was of "paramount" importance in the Mining Law and consequently that granting judicial review of BLM decisions denying patent protests would conflict with Congress' purpose in enacting the statute. *See* Petitioners' Brief at 11; *Clarke*, 454 F.3d at 1183. On the contrary, while the Mining Law affords mining claimants the opportunity to patent their claims, the right to patent was hardly of "paramount" importance.

Perhaps the best evidence that the right to patent is not critically important to the operation of the Mining Law is the fact that Congress has imposed a moratorium on new patent applications since 1994, and yet the right of

miners to stake and develop new claims under the Mining Law remains unaffected. *See* Petitioners' Brief at 10. n. 5. This is not surprising since it has long been recognized that mining claimants with valid claims enjoy all possessory rights necessary to secure the removal of the minerals. As this Court noted shortly after the passage of the Mining Law, mining claimants had an "indefinite tenure on the claimed lands. Thus, receiving a patent (title) was of little if any advantage to the claimant." JOHN LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION, 56 (1987) (*citing Chambers v. Harrington*, 111 U.S. 350, 353 (1884)). Thus, while Congress provided a vehicle for mining claimants to acquire fee title to valid mining claims, the patent process was in no way central to the Mining Law's purpose.

Even assuming, however, that the patent process is important, it does not follow that the right to judicial review should be limited. On the contrary, when the government disposes of its public lands the need for judicial oversight is at its apex. *Cf. Watt v. Western Nuclear, Inc.,* 462 U.S. 36 (1983) (Recognizing "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it," *citing*, *United States v. Union Pacific R. Co.,* 353 U.S. 112, 116 (1957).

CONCLUSION

For the foregoing reasons, the law professors as *amici* strongly urge this Court to grant the petitioners' writ of certiorari and to vacate the judgment of the Tenth Circuit in this matter.

Respectfully submitted,

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